No. 12,808

United States Court of Appeals

For the Ninth Circuit

BANKERS LIFE COMPANY (a corporation),

Appellant,

vs.

RUTH JACOBY,

Appellee.

**Appeal from the United States District Court,
Northern District of California,
Southern Division.**

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

A STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THAT THE DISTRICT COURT HAD JURISDICTION AND THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION.

The complaint in this civil action alleges complete diversity of citizenship, that is, the appellee is a citizen of California and the appellant is a citizen of Iowa, and it also alleges that the "amount" in controversy is in excess of $3,000, namely, a life insurance policy in the principal sum of $5,000. See Transcript of Record, page 3. (Hereafter, for brevity, Transcript of Record shall be abbreviated to Tr.) It also appears

from appellant's Answer that the matter in controversy exceeds the value of $3,000, exclusive of interest and costs. See Tr. p. 13. The pleadings (Complaint and Answer) disclose an actual controversy concerning the ownership of the life insurance policy and the effect thereon of an assignment executed by an agent appointed by a United States District Court in Arkansas, which controversy warrants a declaration by the United States District Court in California of the rights and other legal relations of the interested parties. See Tr. pp. 4-15.

A final Declaratory Judgment was rendered by the District Court. (Tr. pp. 36-37.)

The statutory provisions believed to sustain the jurisdiction of the District Court from whence this appeal is taken are Title 28, United States Code, Sections 1332(a)(1) and 2201.

The statutory provisions believed to sustain the jurisdiction of this Court to review the Judgment are Title 28, United States Code, Sections 1291 and 2201.

A CONCISE ABSTRACT OR STATEMENT OF THE CASE, PRESENTING SUCCINCTLY THE QUESTION INVOLVED AND THE MANNER IN WHICH IT IS RAISED.

(a) The question involved.

The following is a succinct statement of the question involved:

> Where a life insurance policy provides it may be surrendered at any time for its cash surrender

value, and the policy has been assigned to a person by a court-appointed agent of the insured and the named beneficiary, but said assignment has not changed the beneficiary, and said policy is neither lost, destroyed nor stolen but was last known to be in the possession of the insured whose whereabouts are unknown, and there is no evidence that said insured cannot surrender the policy, can the assignee obtain the cash surrender value of the policy without the physical surrender of the policy to the insurer?

(b) The manner in which the question is raised.

This appeal comes up, in effect, upon the Judgment Roll. We believe the Findings of Fact and Conclusions of Law state the case quite well, and therefore they are adopted herein. A concise statement of the case follows.

On June 7, 1930, appellant, Bankers Life Company, issued its policy No. 882714 to Lionel A. Jacoby, insuring his life to the face amount of $5,000. (Finding III, Tr. p. 19.) The contract was made in California. (This does not expressly appear in the findings but it is a fact with which we are sure appellee will agree.) The insured reserved the right to revoke the beneficiary. (Finding III, Tr. p. 19.) Appellee is the insured's first wife. After a divorce and remarriage the insured changed the beneficiary to his second wife, Betty M. Jacoby. (Finding V, Tr. p. 20.) Later, while in Missouri, the insured assigned the policy to said Betty M. Jacoby. (Finding VII, Tr. p. 21.) The policy lapsed for non-payment of premium due De-

cember 7, 1948, and in accordance with the policy terms the insurance thereunder was automatically extended in the same amount of $5,000 for a term of 25 years and 84 days from December 7, 1948. (Findings IX to XIII, inclusive, Tr. pp. 22-25.)

In the meantime, appellee had sued the insured, Lionel A. Jacoby, and his second wife, Betty Jacoby, for money in the United States District Court in Arkansas, and on November 22, 1948, that Court rendered a Judgment in favor of Ruth Jacoby and against Lionel A. Jacoby for $5,700. (Finding XIV, Tr. pp. 25-27.) The Judgment also ordered Lionel A. Jacoby and Betty Jacoby to apply to the payment of the Judgment the cash value of Bankers Life Policy No. *822714.* That was the wrong policy. The correct one is No. *882714.* On January 12, 1949, the said United States District Court in Arkansas made an Order changing the policy number in its Judgment of November 22, 1948, from 822714 to 882714. (Finding XV, Tr. pp. 28-29.)

The provisions of Policy No. 882714 require that the policy itself be surrendered to appellant before the cash surrender value can be paid by appellant. (Finding IX, Tr. pp. 22-24.)

Apparently the insured and Betty Jacoby left the jurisdiction of the Court in Arkansas between November 22, 1948 and January 12, 1949. (Tr. p. 30.)

Also, it appears that on January 12, 1949, the said District Court in Arkansas made another Order appointing one R. G. Hines to execute an assignment of

Policy No. 882714 to Ruth Jacoby, plaintiff therein and appellee herein. (Finding XVI, Tr. pp. 29-31.) On January 14, 1949, R. G. Hines executed the assignment, which is set forth fully in Finding XVII. (Tr. pp. 31-32.) Copies of the Judgment, Orders and Assignment were received by appellant on January 25, 1949. (Finding XVIII, Tr. p. 33.) The assignment executed by the said R. G. Hines did not change the beneficiary (Tr. p. 32) and Betty M. Jacoby is still the beneficiary of the policy. (Conclusions II and III, Tr. p. 34.)

Ruth Jacoby brought this action in the United States District Court in California for a declaration, *inter alia,* that she is entitled to obtain the cash surrender value of the policy without the surrender of the policy. (Tr. p. 6.)

Said Policy No. 882714 has never been surrendered to the appellant for any cash surrender value. Appellee does not have possession of the policy and does not know where it is. The insured was the last person known to have possession of it. His whereabouts are unknown. There is no evidence that he cannot surrender the policy. There is no evidence that the policy has been lost, destroyed or stolen. See Finding XIX, Tr. p. 33.

All of those facts were found by the Court below, and said Court also concluded that the "cash surrender value may be obtained by plaintiff Ruth Jacoby upon compliance with the terms and conditions of said Policy No. 882714." (Conclusion IV, Tr. pp. 34-

35.) On November 10, 1950, the said District Court rendered a Declaratory Judgment (Tr. pp. 36-37) wherein said Court held that the "cash surrender value may be obtained by plaintiff Ruth Jacoby upon compliance with the terms and conditions of said Policy No. 882714, *other than the physical surrender of the policy.*" See Tr. p. 37—last sentence in the next to the last paragraph. Emphasis added.

This appeal is from the Declaratory Judgment upon the ground that the judgment is contrary to and not supported by the Findings of Fact and Conclusions of Law.

SPECIFICATION OF ERRORS RELIED UPON.

The only error specified by appellant is that the part of the Declaratory Judgment which holds that appellee Ruth Jacoby may obtain the cash surrender value of the extended term insurance under appellant's Policy No. 882714 without the physical surrender of said policy to appellant is contrary to and not supported by the Findings of Fact and Conclusions of Law.

Specifically, said portion of the Declaratory Judgment is contrary to and not supported by Findings of Fact III to XIX, inclusive, and Conclusions of Law I to V, inclusive, because under said Findings and Conclusions an assignee of the policy is not entitled to receive from the insurer any cash surrender value until the policy itself has been surrendered to the insurer.

A CONCISE ARGUMENT OF THE CASE.

(a) SUMMARY.

The argument is summarized as follows:

(1) The word "surrender" means to "yield up" or "deliver" and has the same meaning in an insurance policy.

(2) The surrender of the policy to the insurer is a condition precedent to the payment by the insurer of the cash surrender value.

(3) An assignee of a contract of insurance, like the assignee of any other contract, does not acquire a greater right or interest than was possessed by the assignor.

(4) There are no special circumstances in this case creating an exception to the rule that surrender of the policy to the insurer is a condition precedent to the payment of the cash surrender value.

(b) COMMENT ON CALIFORNIA LAW.

Our research has not disclosed any reported case of any court of the State of California deciding the precise question involved.

(c) ARGUMENT OF THE CASE.

Following is the argument on the points set forth in paragraph (a) above in their chronological order:

(1) The word "surrender" means to "yield up" or "deliver" and has the same meaning in an insurance policy.

The use of the word "surrender" is not confined to insurance policies alone. It is a word which has a generally accepted meaning. Webster's New International Dictionary, Second Edition, defines "surrender" as follows: "To yield to the power or possession of another; to give or deliver up possession of (anything) * * * to render back; to give in return; to tender." The word "surrender" has the generally recognized meaning of "deliver up" and "deliver possession" of the instrument or document itself in financial transactions involving such things as promissory notes (10 C.J.S. 1005, Bills and Notes, Sec. 465) and mortgages (59 C.J.S. 735, Mortgages, Sec. 469).

In Words and Phrases, Permanent Edition, under "Surrender," many examples are found wherein "surrender" means to yield, render, deliver up and hand over.

When "surrender" is used in insurance policies it still retains its customary and generally accepted meaning.

In *Goodhue v. Hartford Fire Ins. Co.,* 175 Mass. 187, 55 N.E. 1039, the word "surrender" was used in a fire insurance contract and the Massachusetts Court held " 'Surrender' plainly means only a handing over of the document."

Similarly, when the word "surrender" is used in a life insurance contract, it is given its plain, usual

and customary meaning. In *Wells v. Vermont Life Ins. Co.,* 28 Ind. App. 620, 63 N.E. 578, it was held "To 'surrender' means to cancel or yield up."

In a New York case the plaintiff insured sought to force the insurer to pay him the cash surrender value of his policy. He did not have the policy. The Court refused to require the insurer to pay the cash surrender value without the surrender of the policy and held:

> "Cash surrender means cash on surrender. The admission by plaintiff that he cannot surrender the policy and receipt book or show loss or destruction, as required by the policy, because they are in the possession of his wife in Florida, who refuses surrender, entitled defendant to dismissal of plaintiff's complaint."
>
> *Evans v. Metropolitan Life Ins. Co.,* 33 N.Y.S. (2d) 19, at 20.

(2) The surrender of the policy to the insurer is a condition precedent to the payment by the insurer of the cash surrender value.

The cases uniformly hold that the physical surrender of the policy to the insurer is a condition precedent to the payment of the cash surrender value.

Kothe v. Phoenix Mutual Life Ins. Co., 269 Mass. 148, 168 N.E. 737;

Martin v. New York Life Ins. Co., 104 Fed. (2d) 573;

U. S. v. Mass. Mutual Life Ins. Co., 127 Fed. (2d) 880;

U. S. v. Metropolitan Life Ins. Co., 41 Fed. Supp. 91;

Evans v. Metropolitan Life Ins. Co., supra;
Bethards v. Metropolitan Life Ins. Co., 287 Ill. App. 7, 4 N.E. (2d) 257.

Most of the above cases are concerned with situations where an assignee (pursuant to an assignment executed by a court-appointed agent), a trustee in bankruptcy, the Collector of Internal Revenue, or a judgment creditor of the insured, seeks to obtain the cash surrender value of the policy but is unable to physically surrender the policy to the insurer. The courts uniformly hold that the contractual right of the insurer to receive surrender of the policies as a condition precedent to the paying of cash values of policies is not a mere formal requirement but affords substantial protection of the insurer's interests.

Under the policy involved in this case there is a cash surrender value even after it commences running on extended term. The applicable provisions concerning surrender are included in the Non-Forfeiture Provisions set forth fully in Finding IX, Tr. pp. 22-24. An examination of those provisions discloses the policy provides that after three full years' premiums have been paid the "Policy may be surrendered to the Company at its Home Office" within certain time limits for "(A) Its Cash Surrender Value * * * Or, (B) A Paid Up Participating Policy * * *" but "If the Policy be not surrendered for cash or paid up, as above provided * * * and upon default in payment of any premium the insurance will be automatically extended * * *" and "The extended insurance * * *

*may be surrendered at any time for a cash value equal to the full reserve thereon at the time of surrender * * *"* (Emphasis added.) Thus, it is quite plain that whereas before the policy goes on extended term the surrender may be made only at certain times, nevertheless, after it goes on extended term it *"may be surrendered at any time."* Obviously, although running on an extended term, it is the same policy with the same requirement of *surrender for cash value* at the time of surrender except that the surrender may be made *"at any time."*

The case of *Kothe v. Phoenix Mutual Life Ins. Co.,* supra, is particularly worthy of special mention here because the plaintiff there, before bringing suit against the Phoenix Mutual, had brought a creditor's bill in another court to reach the assets of the insured. In that proceeding the Court established the amount of the insured's indebtedness to the plaintiff and appointed a special master to sell all the right, title and interest of the insured in a life insurance policy and to deliver an assignment to the purchaser. The master did sell and he executed an assignment of the policy to the plaintiff. The insurer was notified of the assignment. On the basis of that assignment the plaintiff sued the insurer for the cash surrender value of the policy. The defense was simply that the policy was not surrendered. The Court held the defense was good. The Court also held that "The circumstance that the insured debtor has absconded will not justify us in holding that the defendant cannot rely on the terms of this contract." The policy involved in that

case provided "*At any time* after the premiums for two years have been paid the Company will purchase this policy for its *cash value on* * * * *surrender* at the Home Office * * *" (Emphasis added.)

The *Kothe* case so closely approaches the lawyers' ideal of the "case in point" that we could not refrain from placing it first among the above cited cases, and trust that this Court will not in any way construe that to be in derogation of the force of the opinions in the Federal and other cases cited thereafter.

(3) An assignee of a contract of insurance, like the assignee of any other contract, does not acquire a greater right or interest than was possessed by the assignor.

It is a well settled rule that the assignee of a contract does not acquire other or greater rights than the assignor possessed and takes the contract subject to all the conditions thereof.

Western Oil and Refining Co. v. Venago Oil Corp., 218 Cal. 733, 24 Pac. (2d) 971;
3 Cal. Jur. 277, 292, Assignments, Secs. 31, 41.

The same rule applies to the assignee of a life insurance contract.

Kothe v. Phoenix Mutual Life Ins. Co., supra;
General Am. L. Ins. Co. v. Omaha Nat. Bank, 134 Neb. 698, 279 N.W. 310;
37 C.J. 435, Life Insurance, Sec. 145.

(4) There are no special circumstances in this case creating an exception to the rule that surrender of the policy to the insurer is a condition precedent to the payment of the cash surrender value.

In the opinions in some of the cases cited in (c) (2) above, there appear, as dicta, statements to the effect that in certain situations a party may seek to be excused from complying with the condition precedent of surrendering the policy.

None of those situations exists here. The findings are explicitly to the contrary. In Finding XIX (Tr. p. 33) the Court found, among other things, that there is no evidence that the policy has been lost, destroyed or stolen, and that there is no evidence that Lionel A. Jacoby (the insured) cannot surrender the policy. It is not sufficient that plaintiff relies upon the fact that the whereabouts of the insured are unknown (*Kothe v. Phoenix Mutual Life Ins. Co.,* supra), or that someone else has the policy and refuses to give it up (*Evans v. Metropolitan Life Ins. Co.,* supra) or that the plaintiff never had possession of the policy (*Kothe v. Phoenix Mutual Life Ins. Co.,* supra).

The dictum in *Martin v. New York Life Ins. Co.,* supra, does not apply here because there the Court said "It is not sufficient * * * that the plaintiff makes a showing that it is impossible to surrender the policies," but the party must also show that the granting of the relief will not jeopardize the insurer's interest. There are two reasons why this dictum does not apply here. First, as previously pointed out, there is a finding that there is no evidence that it is impossible to

surrender the policy, and second, there is a beneficiary of the policy other than the appellee, and appellant becomes liable to said beneficiary in the amount of $5,000 in the event of the death of the insured.

CONCLUSION.

It is respectfully submitted that the judgment should be reversed in so far as it holds that the "cash surrender value may be obtained by plaintiff Ruth Jacoby upon compliance with the terms and conditions of said policy No. 882714, other than the physical surrender of the policy." The clause "other than the physical surrender of the policy" is the objectionable part and is contrary to and not supported by the Findings of Fact and Conclusions of Law.

Dated, San Francisco, California,
March 26, 1951.

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